In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 83

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, PETITIONER

v.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE J. PICKARD, ET AL.

MEMORANDUM OF THE FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The facts of the case are adequately set forth in the petition for certiorari.

In short, the Federal Communications Commission found that a contract, whereby respondents were permitted to manage, and retain most of the proceeds from, the radio station for which a license had been granted to petitioner, was in violation of Section 310(b) of the Communications Act (47 U. S. C. § 310(b)) [1] and not in the public interest, and refused to renew petitioner's license if the con-

[1] The statutory provisions are printed in the Appendix to the Petition for Certiorari.

tract was not discontinued. The petitioner thereupon, on April 15, 1943, entered into a second contract whereby the first was abrogated, but under which respondents were to receive 15% of the radio station's gross receipts, including receipts from new services such as FM or television, until January 6, 1950. After a hearing, of which respondents had actual notice, the Commission held that the granting of the application for renewal of license with the licensee subject to the provisions of the contract of April 15, 1943 would not be in the public interest on three grounds: (1) the provisions for payment, based upon a substantial percentage of gross receipts, might jeopardize the licensee's financial ability to conduct future operation of the station in the public interest; (2) the provision for sharing in the receipts from new services such as FM and TV operated as a deterrent to development of such services by the licensee; and (3) the new contract in fact was a means of giving further effect to the previous arrangement found by the Commission to be unlawful. (R. 64-71) This proposed denial was, however not unqualified. For, the Commission further proposed that (R. 71):

> The application, therefore, should be denied, without prejudice, however, to the submission within ninety days by the Georgia School of Technology of a new application for a construction permit and license to operate on the same frequency, provided it is affirmatively shown that no further effect is given

to the agreements between the Georgia School of Technology and Southern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest.

Thereafter, on October 11, 1945, the petitioners passed a resolution to the effect that the contract would no longer be complied with, but that this action was to be without prejudice to a fair adjustment or settlement of whatever rights respondents may have, subject to the approval or consent of the Federal Communications Commission. (R. 72.) The Commission then granted the application for renewal of the license.

Respondents' predecessor participated in the first proceeding before the Commission but did not seek review of the Commission's decision in the courts. Respondents had actual notice and knowledge of the second proceeding, but failed to intervene. Respondents also received adequate notice of petitioner's intention not to contest the Commission's decision prior to such time as respondents could have petitioned for rehearing before the Commission or could have taken an appeal as a "person aggrieved" by the Commission's decision, under Section 402(b)(2) of the Communications Act. Cf. *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. 2d 244 (C. A. D. C.).

Respondents then sued petitioner for breach of contract in the State court, and were awarded the precise amount which they would have received under the contract of April 15, 1943. The Federal Communications Commission appeared as *amicus curiae* in support of the petitioner in the State trial and appellate courts. The Georgia court held that the Commission had no authority to regulate private contract rights, and indeed, that it could not constitutionally be granted any such authority (R. 137-138).

The decision below compelled the petitioning radio licensee to pay the exact amount which it was obligated to pay under the contract which the Federal Communications Commission found to be contrary to the public interest. The decision thus nullifies the action of the Commission in refusing to grant a radio license to petitioner except on condition that the contract be terminated. To permit a State court so to disregard or override the orders of a federal agency would frustrate the operation of the federal statute, and violate the basic teaching of the Supremacy Clause.

In particular is this so when the federal statute prescribes the manner in which administrative decisions are to be reviewed in the courts—in this situation in the Court of Appeals for the District of Columbia Circuit, and on writ of certiorari in this Court. Since this means of challenging the Commission's orders was available to respondents, they should not be allowed to circumvent the statu-

tory procedure by attacking the Commission's decision collaterally in the state courts.[2] Even an erroneous Commission decision would not be subject to such a collateral attack.

The court below was of the view that the Commission lacked jurisdiction over the subject because private contract rights were involved. But the Commission unquestionably has the authority to determine whether the provisions of a contract between a licensee and a third party prevent an applicant for a license from meeting the statutory test of "public convenience, interest or necessity." Cf. *National Broadcasting Co.* v. *United States*, 319 U. S. 190. In this case it appears that the Commission was concerned with the contract of April 15, 1943 exclusively from the point of view of the public interest in the field of radio broadcasting, as it bears on arrangements entered into by applicants which may adversely affect their ability to operate in the public interest, and which are inconsistent with the Communications Act. The features of the contract passed upon by the Commission were not its validity under requirements of the law of contracts, or any other body of law exclusively concerned with the private rights and duties of the parties, but rather its effect upon the future

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[2] *Venner* v. *Michigan Central Railroad Co.*, 271 U.S. 127; *Atchison, T. & S. F. Ry. Co.* v. *Scarlett*, 300 U.S. 471; *Hagens* v. *United Fruit Co.*, 135 F. 2d 842 (C.A. 2); *Ingram* v. *Union Stock Yards Co.*, 64 F. 2d 390 (C.A. 8); *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 789 (C.A. 6).

operation of the station from the standpoint of the public interest with respect to its financial ability to continue adequate operation, its effect in imposing restraints on expansion of the station into new fields of broadcasting, and its effect on the public interest in the enforcement of Section 310(b) of the Communications Act. It is well established that private contracts cannot thwart the exercise of the regulatory powers of Congress. *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 282; *Louisville & N. R. R. Co.* v. *Mottley*, 219 U. S. 467; *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 306-311.

Since the Commission here had expressly made findings with respect to the lack of public interest in the contract involved, this case presents a more direct interference with the federal statutory scheme than did *Radio Station WOW* v. *Johnson*, 326 U. S. 120, where the Commission had itself made no findings as to the issue of fraud presented to the State courts for adjudication. The Court, nevertheless, held in that case that the Nebraska Court's decree would invade the area of jurisdiction reserved to the Commission under the Communications Act.

The issues presented by this case are of obvious importance to the successful working of the federal regulatory scheme. State courts should not be permitted to compel conduct which a federal agency has lawfully held to be contrary to the public interest—and that is the effect of the Georgia deci-

sion here. In the *WOW case* (326 U. S. at 123), this Court granted certiorari "because of the importance of the contention that the State court's decision had invaded the domain of the Federal Communications Commission." We believe that the same considerations even more strongly require the issuance of the writ in this case.

Respectfully submitted,

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